

BRB No. 92-2190

GEORGE EKERSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
COLUMBIA RIVER LOG SCALING)	
BUREAU)	DATE ISSUED:
)	
and)	
)	
SAIF CORPORATION)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order - Award of Benefits and Order Awarding Attorney's Fees
of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

Sheri B. Greenbaum and Kevin Keaney (Pozzi, Wilson, Atchison, O'Leary & Conboy),
Portland Oregon, for claimant.

Norman Cole (SAIF Corporation), Portland, Oregon, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY,
Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Awarding Benefits and Order Awarding Attorney's Fees (91-LHC-1500) of Administrative Law Judge Ellin M. O'Shea rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant suffered carpal tunnel syndrome in the early 1970's while working for employer as

a log scaler. The condition resolved at that time, but subsequent to his retirement in 1984, claimant's condition worsened, and he underwent surgery on both wrists. Dr. Strukel, carrier's medical advisor, stated claimant has a 22 percent impairment in each wrist under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*). Although Dr. Nolan, claimant's treating physician, initially rated claimant as 22 percent impaired in the right wrist and 23 percent impaired in the left wrist, he subsequently opined that claimant suffered an additional 10 percent loss of pinch and grip strength, and concluded that claimant is 32 percent impaired in the right wrist, and 33 percent impaired in the left wrist. Dr. Button stated that claimant's loss of grip and pinch strength was included in the 22 percent impairment rating and that an additional 10 percent rating was not necessary in part because claimant's wrist condition improved after surgery. Claimant testified that his grip strength worsened over time.

In the Decision and Order - Awarding Benefits, the administrative law judge found that claimant has a 22 percent impairment in each wrist based on Dr. Button's opinion, which she credited over Dr. Nolan's opinion. The administrative law judge therefore awarded claimant permanent partial disability benefits commencing December 14, 1990 for a 22 percent impairment of each upper extremity for 68.64 weeks.¹

On appeal, claimant contends that the administrative law judge erred in failing to find that he has at least a 32 percent and 33 percent impairment in the right and left arms, respectively, based on Dr. Nolan's opinion. Claimant contends that the administrative law judge erred in relying on Dr. Button's opinion, as Dr. Button did not independently rate claimant's impairment under the AMA *Guides*, and that she should have credited Dr. Nolan's opinion, as he is claimant's treating physician. Employer responds, urging affirmance of the administrative law judge's decision.

We affirm the administrative law judge's finding that claimant has a 22 percent impairment to each arm as it is supported by substantial evidence. The administrative law judge considered claimant's contentions, the relevant medical evidence, and the relevant portions of the AMA *Guides*, and found Dr. Button's opinion that an additional 10 percent

¹Although the administrative law judge states she is awarding claimant benefits pursuant to the retiree provisions at Sections 2(10), 8(c)(23) and 10(d)(2), 33 U.S.C. §§902(10), 908(c)(23), 910(d)(2) (1988), it is apparent that she entered awards pursuant to the schedule at Section 8(c)(1), (19), 33 U.S.C. §908(c)(1), (19), as the awards are for 68.64 weeks (22% x 312 weeks). No party challenges this aspect of the award.

rating for claimant's loss of pinch and grip strength is redundant to be reasonable consistent with the AMA Guides.² The administrative law judge specifically considered and claimant's contention that Dr. Button did not perform a closing evaluation or rate claimant under the AMA Guides and found that the overall probative value of Dr. Button's opinion outweighed any alleged weaknesses in his testimony. The administrative law judge also noted that Dr. Strukel's ratings were based on Dr. Button's measurements of claimant's impairment, and that Dr. Button performed the surgery on claimant's wrists. She further found Dr. Button's opinion that claimant improved after surgery was more credible than claimant's testimony that his condition worsened. Inasmuch as the administrative law judge rationally determined, based on Dr. Button's opinion, that claimant's loss of grip and pinch strength is included in the 22 percent rating of claimant's wrists, we affirm the award of benefits based on the 22 percent impairment to each arm. See *Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154 (1993); see generally *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

We next consider claimant's appeal of the administrative law judge's attorney's fee award. Claimant's attorney submitted a fee petition requesting a fee of \$9,353.13 for 55.125 hours of services before the administrative law judge from March 13, 1991 through May 28, 1992, at an hourly rate of \$175, plus \$1,123.81 in costs. Thereafter, employer submitted objections to the fee petition. By letter dated July 27, 1992, claimant responded to the objections, agreeing that only fees and costs for work performed after April 2, 1991, the date the case was referred for a formal hearing, were payable by employer. Employer responded, submitting further objections.

In the Order Awarding Attorney's Fees, the administrative law judge found that employer is not liable for fees and costs incurred prior to April 2, 1991, and is not liable for fees and costs incurred after October 7, 1991, the date employer agreed to pay claimant the amount of compensation subsequently awarded in the administrative law judge's decision. The administrative law judge therefore deducted 40 hours from the requested fee. The administrative law judge also reduced the hourly rate from \$175 to \$150, stating \$175 is not the norm for legal services performed by Portland counsel with qualifications and experience similar to that of claimant's counsel. The administrative law judge therefore found that employer is liable for an attorney's fee of \$2268.72, representing 15.125 hours at an hourly rate of \$150, plus \$416.45 in costs.

On appeal, claimant's counsel contends employer is liable for all attorney's fees and costs incurred after April 2, 1991, because employer did not pay or tender the amount of compensation to which it believed claimant was entitled within 14 days of the district director's written recommendation pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b). Further, claimant's counsel contends that attorney David A. Hytowitz should be paid an hourly rate of \$175, as that is his customary fee, his firm is located in Portland with high overhead and expenses, and he has extensive experience.

Section 28(b) provides that when employer pays or tenders payment of compensation without an award, and the employee refuses to accept such payment or tender, employer is liable if

²The AMA Guides state that if loss of grip is felt to represent an additional impairing factor not already taken into account it may be measured and the loss rated. AMA Guides (3rd ed. rev.) at 53.

the employee successfully obtains greater compensation than that originally paid or tendered by employer. 33 U.S.C. §928(b); *Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180 (1987). While Section 28(b) states that employer should pay or tender payment within 14 days after its receipt of the district director's recommendation, the issuance of the district director's recommendation is not required to establish employer's liability as employer may be liable even if the district director did not issue a recommendation. *National Steel & Shipbuilding Co. v. U.S. Dept. of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979). In light of the Ninth Circuit's decision in *National Steel & Shipbuilding Co.*, the Board has held that references in Section 28(b) to informal conferences and other procedures must be regarded as suggested guidelines rather than prerequisites. *Caine*, 19 BRBS at 182. Thus, once employer pays or tenders the additional compensation to which it believes claimant is entitled, and claimant is not successful in obtaining greater compensation, employer is not liable for claimant's attorney's fee after the date it pays or tenders the compensation. See generally *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65 (CRT) (9th Cir. 1991). Inasmuch as employer paid claimant on October 7, 1991, the benefits to which the administrative law judge found claimant is entitled, the administrative law judge properly found that employer is not liable for counsel's services and costs incurred after that date. Further, we reject claimant's contention that the administrative law judge erred in reducing the hourly rate from \$175 to \$150 as claimant has not met his burden of showing the \$150 hourly rate awarded is unreasonable. See *Ferguson v. Southern States Cooperative*, 27 BRBS 16, 23 (1993).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits and Order Awarding Attorney's Fees are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge